

**Before the  
Administrative Hearing Commission  
State of Missouri**

CABLE AMERICA MISSOURI LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 14-0221 RS
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

**DECISION**

We dismiss the complaint filed by Cable America Missouri LLC (“Cable America”) because it lacks standing to pursue its appeal.

**Procedure**

On February 13, 2014, Cable America filed a complaint challenging two final decisions of the Director of Revenue (“the Director”) in which he denied refund claims filed by National Cable TV Cooperative (“National Cable”), a different taxpayer. We opened the case under National Cable’s name. On March 17, 2014, the Director filed an answer, a motion to correct the caption of the case, and a motion for summary decision. By order dated March 19, 2014, we changed the caption to reflect that Cable America was the petitioner.

On April 8, 2014, Cable America filed a response to the motion for summary decision to which it attached an affidavit, but it controverted none of the proposed findings of fact contained in the Director’s motion. At the Director’s request, we held oral argument on the motion on October 7, 2014.

Regulation 1 CSR 15-3.446(6)<sup>1</sup> provides that we may decide this case without a hearing if the Director establishes facts that Cable America does not dispute and entitle the Director to a favorable decision. The following facts, established by certified copies of the Director's records attached to his motion, are undisputed.

### **Findings of Fact**

1. On August 27, 2010, National Cable filed a Form 472B Application for Sales/Use Tax Refund/Credit with the Director, requesting a use tax refund in the total amount of \$33,339.95, for the tax periods from December 1, 2007 through June 30, 2009 (the 2010 claim).
2. On March 23, 2012, National Cable filed a Form 472B application for refund with the Director requesting a use tax refund in the total amount of \$69,152.73 for the tax periods 2008 to 2011 (the 2012 claim).
3. On the Form 472B submitted to the Director, National Cable wrote in the "reason for overpayment" block:

National Cable Television Cooperative, Inc. ("NCTC") is a Kansas not for profit buying organization for the benefit of its members which includes Cable America Missouri, LLC ("CAM"). Tax monies collected by NCTC as a result of product purchases are forwarded to the appropriate taxing authority. CAM purchased certain materials through NCTC it claims is [sic] exempt from tax pursuant to Mo. Rev. Stat. Section 144.030. NCTC cannot and does not represent that the attached supporting information is true, complete and/or correct as it was provided by CAM for the purpose of this refund request.

### *Motion, Exhibit A, Document 1.*

The Director subsequently determined from his review that National Cable had collected and remitted use tax as a vendor.

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<sup>1</sup> All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

4. The Director issued a final decision denying the 2010 claim on December 20, 2013, and a final decision denying the 2012 claim on December 24, 2013.

5. National Cable did not file an appeal of either of those final decisions within sixty days of the Director's mailing of the final decisions.

6. On February 13, 2014, Cable America filed this complaint, seeking to appeal the Director's decisions denying National Cable's refund claims for use tax Cable America allegedly paid to National Cable on its purchases from National Cable.

7. Cable America attached to its complaint a copy of the Department of Revenue's Form 5433, Assignment of Rights from the Seller to Purchaser for Refund under Section 144.190.4(1), dated February 11, 2014 and signed by the assistant controller of National Cable.

### **Conclusions of Law**

This Commission has jurisdiction over appeals from the Director's final decisions. Sections 144.261 and 621.050.1.<sup>2</sup> Cable America has the burden to prove that it is entitled to a refund. Section 621.050.2.

Section 144.610 imposes a tax upon "the privilege of "storing, using or consuming within this state any article of tangible personal property[.]" It is the purchaser's duty to pay the use tax, but with certain exceptions not relevant to this case, §§ 144.635 and 144.655 make it the vendor's duty to *collect and remit* the tax. Section 144.696 provides that "Section 144.190, pertaining to the refund of overpayments, claims for refund, and the time within which refunds shall be claimed, is applicable to the tax levied under the compensating use tax law." Thus, taxpayers who file claims for refunds of use tax must follow the procedures set forth in that statute.

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<sup>2</sup> Statutory references are to the RSMo 2000 unless otherwise indicated.

This allocation of duties – to purchasers, to pay the tax, and to sellers, to remit the tax – has at times presented issues of standing for purchasers wishing to claim refunds of sales or use tax. At all times relevant in this case, §144.190.2, RSMo Supp. 2013, has stated:

If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, **such sum shall be credited on any taxes then due from the person legally obligated to remit the tax** pursuant to sections 144.010 to 144.525, and the balance, with interest as determined by section 32.065 **shall be refunded to the person legally obligated to remit the tax**, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

(Emphasis added).

In *Galamet, Inc. v. Director of Revenue*, 915 S.W.2d 331 (Mo. banc 1996), the Missouri Supreme Court explained how standing under § 144.190 had evolved up to that point:

The controlling issue is whether Galamet, as a purchaser, has standing to demand a refund directly from the Department of Revenue. Refunds of sales tax are governed by § 144.190, RSMo, and 12 CSR 10-3.516 and 12 CSR 10-3.520. In *Norwin G. Heimos Greenhouse v. Rev. Director*, 724 S.W.2d 505 (Mo. banc 1987), this Court reasoned that the legislature, by use of the general word “person” in § 144.190, intended to allow anyone burdened by the collection of sales tax to request a refund. *Id.* at 507. While 12 CSR 10-3.520 purported to limit standing only to sellers, the Court held the regulation invalid because it was “plainly inconsistent with the terms of § 144.190.” *Id.*

After *Greenhouse*, however, the legislature amended § 144.190 so that the term “person” is now limited to “the person legally obligated to remit the tax.” 1988 Mo. Laws 571. While purchasers have a statutory duty to pay sales tax to sellers under § 144.060, it is the person receiving that payment who has the duty to “remit” the taxes to the Director. § 144.080.1, RSMo. Thus, the legislature amended § 144.190 with the apparent intent to limit refunds to those who have a legal obligation to pay sales tax directly to the Department of Revenue. Because Galamet has no legal obligation to make this direct payment, it has no standing to request a refund under § 144.190. Galamet’s remedy, if any, is to

prevail upon KCP&L, the statutory remitter of the sales tax, to apply for the refund.

*Id.* at 336.

The principle that under § 144.190, the seller or vendor is the party “legally obligated to remit the tax” and is the only party with standing to claim a refund was reaffirmed in later cases as well. As the court stated in *Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834-35 (Mo. banc 2002): “The plain language of section 144.190 requires that the person requesting the tax refund be the person ‘legally obligated to remit the tax.’ Consequently, it is Sprint’s vendors, who are statutorily obligated to collect and remit the sales and use taxes, who must file for the tax refund, not Sprint.” (footnotes omitted).

But effective August 28, 2012, the following sections were added to § 144.190 by House Bill 1504:

4. Notwithstanding the provisions of section 32.057 , **a purchaser that originally paid sales or use tax to a vendor or seller may submit a refund claim directly to the director of revenue for such sales or use taxes paid to such vendor or seller and remitted to the director, provided** no sum shall be refunded more than once, any such claim shall be subject to any offset, defense, or other claim the director otherwise would have against either the purchaser or vendor or seller, and **such claim for refund is accompanied by either:**

**(1) A notarized assignment of rights statement by the vendor or seller to the purchaser allowing the purchaser to seek the refund on behalf of the vendor or seller.** An assignment of rights statement shall contain the Missouri sales or use tax registration number of the vendor or seller, a list of the transactions covered by the assignment, the tax periods and location for which the original sale was reported to the director of revenue by the vendor or seller, and a notarized statement signed by the vendor or seller affirming that the vendor or seller has not received a refund or credit, will not apply for a refund or credit of the tax collected on any transactions covered by the assignment, and authorizes the director to amend the seller's return to reflect the refund; **or**

**(2) In the event the vendor or seller fails or refuses to provide an assignment of rights statement within sixty days from the**

**date of such purchaser's written request to the vendor or seller, or the purchaser is not able to locate the vendor or seller or the vendor or seller is no longer in business, the purchaser may provide the director a notarized statement confirming the efforts that have been made to obtain an assignment of rights from the vendor or seller.** Such statement shall contain a list of the transactions covered by the assignment, the tax periods and location for which the original sale was reported to the director of revenue by the vendor or seller. The director shall not require such vendor, seller, or purchaser to submit amended returns for refund claims submitted under the provisions of this subsection. Notwithstanding the provisions of section 32.057, if the seller is registered with the director for collection and remittance of sales tax, the director shall notify the seller at the seller's last known address of the claim for refund. If the seller objects to the refund within thirty days of the date of the notice, the director shall not pay the refund. If the seller agrees that the refund is warranted or fails to respond within thirty days, the director may issue the refund and amend the seller's return to reflect the refund. For purposes of section 32.069, the refund claim shall not be considered to have been filed until the seller agrees that the refund is warranted or thirty days after the date the director notified the seller and the seller failed to respond.

**5. Notwithstanding the provisions of section 32.057, when a vendor files a refund claim on behalf of a purchaser and such refund claim is denied by the director, notice of such denial and the reason for the denial shall be sent by the director to the vendor and each purchaser whose name and address is submitted with the refund claim form filed by the vendor. A purchaser shall be entitled to appeal the denial of the refund claim within sixty days of the date such notice of denial is mailed by the director as provided in section 144.261 . The provisions of this subsection shall apply to all refund claims filed after August 28, 2012.** The provisions of this subsection allowing a purchaser to appeal the director's decision to deny a refund claim shall also apply to any refund claim denied by the director on or after January 1, 2007, if an appeal of the denial of the refund claim is filed by the purchaser no later than September 28, 2012, and if such claim is based solely on the issue of the exemption of the electronic transmission or delivery of computer software.

(Emphasis added). Thus, as of August 28, 2012, the law changed to allow a purchaser, under certain circumstances, to pursue a refund claim. The changes to § 144.190 allow several avenues for this pursuit. A purchaser may file the initial refund claim itself, with the proper statement or

assignment of rights, under § 144.190.4. If that refund claim is subsequently denied, the purchaser, as the recipient of the Director's final decision, would have standing to appeal that decision under § 621.050. But for claims filed on or after August 28, 2012, even if a vendor files an initial refund claim, the purchaser may appeal the denial of such a claim under § 144.190.5. In other words, the general assembly has granted standing to purchasers to pursue refund claims provided certain conditions are met.

The Director points out that the refund claims at issue in this case were filed before the 2012 amendments to § 144.190 were effective. He argues that Cable America, as the purchaser, lacks standing under the old law and cannot proceed under the new law because 1) the refund claims were filed before the new law became effective; 2) National Cable, not Cable America, filed the refund claims; and 3) the original refund claims were not accompanied by an assignment of rights.

Cable America disputes none of the facts on which the Director bases his motion, but makes several policy arguments as to why its appeal should not be dismissed. It argues that the economic reality is that the purchaser pays the vendor's legal cost in pursuing a claim such as this one, since the purchaser is the real party in interest who will receive the refund. It admits that "perhaps the assignment of appeal rights transaction was not consummated in ideal fashion" in this case, but contends that "it was Vendor's intent all along simply to allow Petitioner to pursue this claim before the AHC as Petitioner was the party with the true economic interest." *Pet. Brief in opposition to Motion at 3.* This contention is supported by an affidavit from National Cable attached to Cable America's response to the Director's motion. Finally, Cable America argues that when the refund claims were filed, neither it nor National Cable was represented by counsel, and that we should therefore construe its complaint liberally under 1 CSR 15-3.350(1).

But the problem does not lie not with our construction of the complaint. The real problem is that the refund claims at issue were submitted before August 28, 2012. Cable America initially proceeded as proper under the version of § 144.190 in effect when its refund claims were filed. It prevailed upon National Cable to file the refund claims, but when the Director denied the claims, National Cable did not file an appeal. Cable America then tried to proceed in a fashion similar to the procedure found in § 144.190.5, by filing its own appeal of the denied refund claims. In asking us not to grant the Director's motion to dismiss, it essentially asks that we construe its complaint as one filed on behalf of National Cable.

We lack the authority to do so. Statutes allowing tax refunds, as limited waivers of the State's sovereign immunity, must be strictly construed:

Tax refund provisions are strictly construed *against* the taxpayer. Construction of refund provisions against the taxpayer is consistent with the general rule that the state's sovereign immunity shields it from refunding taxes voluntarily paid, even if illegally collected, and refund statutes are limited waivers of sovereign immunity to allow the recovery of money wrongly collected. As a consequence of this rule, statutory provisions waiving sovereign immunity are strictly construed, and when the state consents to be sued, it may prescribe the manner, extent, procedure to be followed, and any other terms and conditions as it sees fit.

*Insurance Co. of State of Pa. v. Director of Revenue and Director of Ins.*, 269 S.W.3d 32, 35 - 36 (Mo. banc, 2008) (internal quotations omitted). And, once the legislature has established a policy governing claims for refunds, “[t]he courts are not entitled to judicially amend the statutes to provide for a different or additional process of arranging for taxpayer refunds.” *State ex rel. Lohman v. Brown*, 936 S.W.2d 607, 611 (Mo.App. W.D. 1997).

The Missouri general assembly has prescribed how sales and use tax refunds must be claimed. Refund claims filed after the effective date of House Bill 1504 – August 28, 2012 – may be filed by the purchaser who paid the tax to the vendor if the purchaser attaches the



required assignment of rights statement or a notarized statement confirming its efforts to obtain such a statement. But refund claims filed before that date must be filed by the vendor who remitted the tax to the Department. Consequently, if the Director denies that refund claim, only the vendor may appeal that denial.

In *Underwood v. St. Joseph Board of Zoning Adjustment*, 368 S.W.3d 204 (Mo. App. W.D., 2012), the court addressed a situation in which a local zoning board denied a property owner's request for a zoning variance, and the circuit court reversed the zoning board's decision. The property owner's neighbor, who was not a party to the original action, then filed an appeal of the circuit court's decision. The court dismissed her appeal for lack of standing. It noted that although § 89.110 provided for appeal of a zoning board's decision to circuit court by "any person aggrieved" by the decision, Supreme Court Rule 100.02 governed judicial review of administrative decisions in the appellate courts, and that rule applied specifically to *parties*. Because the neighbor was not a party to the circuit court case, she lacked standing.

This case does not involve an appeal to circuit court or the court of appeals. But, as in *Underwood*, we look to the statute governing appeals to this Commission from the Director's final decisions. Section 621.050 provides:

Except as otherwise provided by law, any person or entity shall have the right to appeal to the administrative hearing commission from any . . . decision . . . made by the director of revenue. **Any person or entity who is a party to such a dispute shall be entitled to a hearing** before the administrative hearing commission . . .

(Emphasis added). Cable America was not a party to the dispute with the Director. It lacks standing to file an appeal of a final decision involving another party under § 621.050. And, because the amendments to § 144.190 do not apply to refund claims filed before August 28, 2012, it lacks standing to pursue the refund under that statute.

The refund claims at issue were filed before the effective date of HB 1504. National Cable filed the refund claims. Only National Cable could appeal the Director's decisions to deny those claims. Cable America lacks standing to appeal those decisions. We must dismiss its complaint.

**Summary**

Cable America lacks standing to pursue its appeal. We dismiss its complaint.

SO ORDERED on December 1, 2014.

// *Karen A. Winn*  
KAREN A. WINN  
Commissioner